No. 88-1486

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In The

Supreme Court of the United States

October Term, 1988

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,

Petitioners,

v.

TRANSPORT WORKERS' UNION OF PHILADELPHIA, LOCAL 234, *et al.*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS BROTHERHOOD OF LOCOMOTIVE ENGINEERS, DIVISION 71; THOMAS C. BRENNAN; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; UNITED TRANSPORTATION UNION; TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION; AND BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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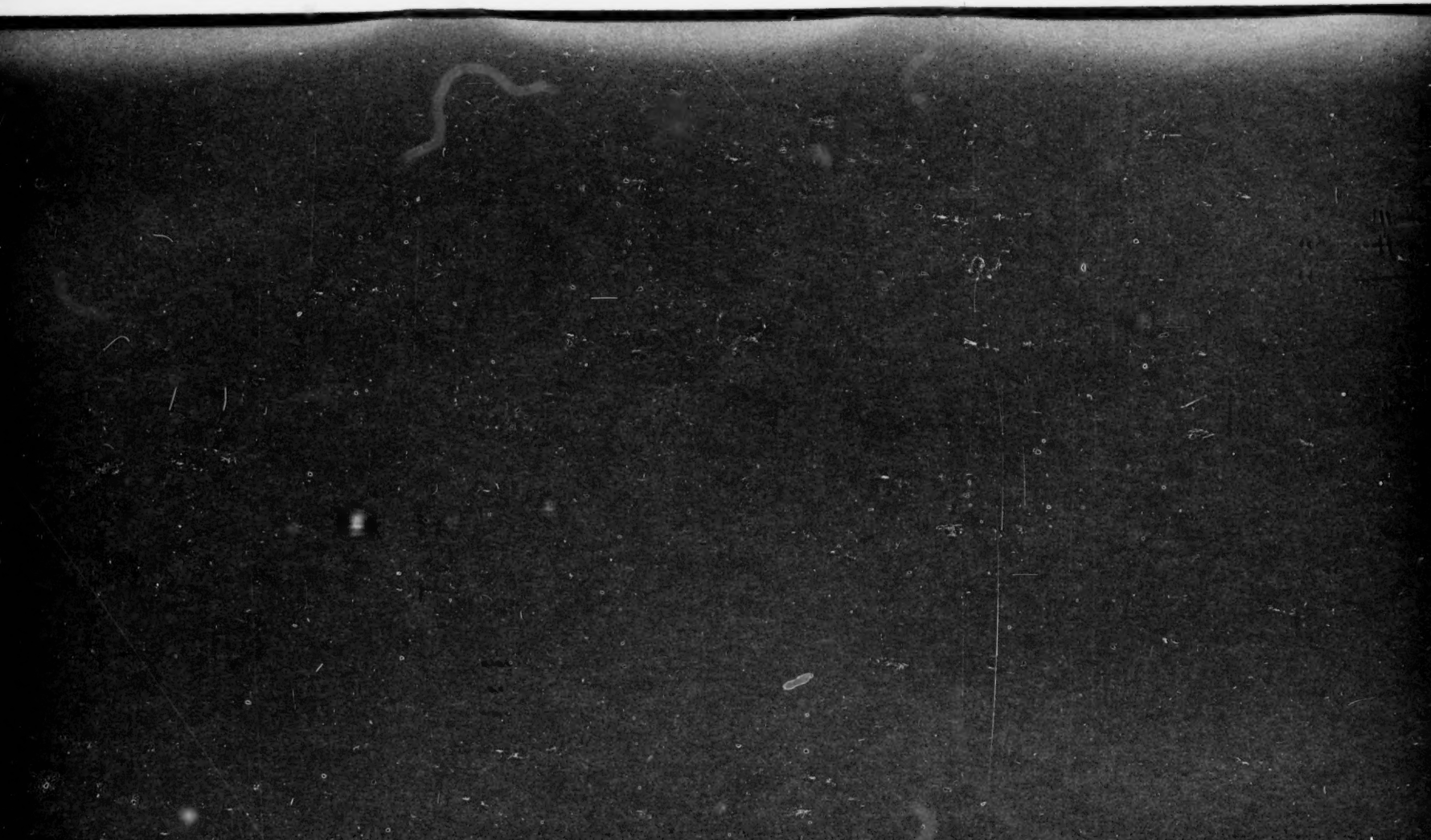

QUESTION PRESENTED

Whether the court of appeals correctly held that a rail carrier violates the major dispute provisions of the Railway Labor Act by unilaterally instituting random drug and alcohol testing of its employees, when the bargaining agreement is silent on the subject and the program differs significantly from past practice.

PARTIES BELOW

Respondent Brotherhood of Locomotive Engineers is the bargaining representative for the craft of locomotive engineers employed by the petitioner Southeastern Pennsylvania Transportation Authority ("SEPTA"). Respondent United Transportation Union is bargaining representative for the crafts of operating employees (other than locomotive engineers) on SEPTA. Respondent Transportation Communications International Union (formerly Brotherhood of Railway, Airline and Steamship Clerks) represents the craft of clerical employees employed by SEPTA; and the respondent Brotherhood of Maintenance of Way Employes is the collective bargaining representative for the craft of maintenance of way employees working for SEPTA. The respondents, none of which are corporations, were the plaintiffs in the district court.

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STATEMENT OF THE CASE

As the Court recently discerned in *Skinner v. Railway Labor Executives' Ass'n*, 57 *U.S.L.W.* 4324 (U.S. March 21, 1989), for almost a century, railroad employees have been required to comply with "Rule G," which forbids reporting to work under the influence of and on-the-job use or

possession of alcohol and drugs. On Southeastern Pennsylvania Transportation Authority ("SEPTA"), Rule G reads:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited
>
> Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties J.A. III, 1028a.[1]

However, over those same years throughout the railroad industry, including on SEPTA and Consolidated Rail Corporation ("Conrail"), which handled the involved rail operations prior to SEPTA, the method for detection of Rule G violations was not set forth in any agreement. SEPTA has not disputed this fact. *E.g.*, JA I, 224a-225a; 249a-251a; 255a-256a. Rather, by decades of past practice, a mutually accepted method of detection and enforcement evolved in which employees exhibiting outward manifestations of a drugged or intoxicated state, *i.e.*, visual evidences of unusual behavior or behavior associated with drug or alcohol use, were charged with Rule G violations. JA I, 225a; 250a-251a; 256a; 258a-259a; 264a-265a. As one witness testified as to the method for Rule G enforcement: "Visual observation by supervisors of an individual who may have been impaired; questioning of that individual; examination of his physical demeanor; and, if it was determined that he was under the influence, he was removed from service." JA I, 246a.

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[1] References herein to "J.A." are to the three volume Joint Appendix filed in the court of appeals. Those citations to "Pet. App." are to the appendix accompanying the petition, and reference to "Resp. App." are to the appendix to this brief.

SEPTA, which provides commuter transportation services in the five county Philadelphia metropolitan area, began operating commuter rail service through its Regional Rail Division with its own employees on January 1, 1983, when those functions were taken away from Conrail by the Northeast Rail Services Act of 1981, 45 U.S.C. §744(a). JA I, 76a; 78a; 82a. The labor relations of SEPTA's Rail Division are governed by the Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq*. Pursuant to the RLA, SEPTA's locomotive engineers are represented by respondent Brotherhood of Locomotive Engineers ("BLE"), its operating employees (other than locomotive engineers) by respondent United Transportation Union ("UTU"), its clerical, office, station and telegraphic (block operators) employees by the Transportation Communications International Union ("TCU"), and its maintenance of way employees by the Brotherhood of Maintenance of Way Employes ("BMWE"). JA I, 73a-75a.

Following the assumption of the commuter rail service by SEPTA, the respondent rail unions individually sought to foster alcohol and drug prevention programs based upon equitable, humane principles, including rehabilitation or employee assistance plans, along with identification and intervention plans drawn on the lines of the Union Pacific program and CSX Transportation's medical mode program, all of which were designed to treat with the problem efficiently and effectively. JA I, 228a; 254a; 260a; JA III, 1232a-76a. Joining another group of railroads, like Conrail and Burlington Northern, SEPTA repelled all of these efforts. It adamantly opposed any program with labor participation and employee assistance, even though its own expert at trial, Dr. Robert J.

Pandina, testified "absolutely" in response to the question as to whether "one of the major ingredients in having a good drug and alcohol program with any employer is a cooperative program between labor and management," and also agreed that negotiated programs are "most desirable." *See* Resp. App. 1a-5a.

Contrary to the picture SEPTA portrays, this attitude and approach extended throughout the entire proceeding and was recognized by the trial judge, who stated in his opinion on permanent injunction:

> . . . [I]n my view, a much better program could have been proposed if SEPTA had abandoned its traditional approach to labor-management issues. . . . The best chance of success with such a program is to have the cooperation of labor, which requires that management share – just as a matter of enlightened self-interest – some of its decision-making and administrative powers. This SEPTA has agreed to do only in small measure.

Pet. App. A43, at n. 12.[2]

After SEPTA took over rail operations, it made a minor modification in the Rule G policy. On July 1, 1983, it issued Rule I, which extended Rule G to "[t]hose suspected of drug use." JA II, 988a.

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[2] Not only the Union Pacific and CSX examples, but the fact that the Brotherhood of Railroad Signalmen and Transport Workers' Union of Philadelphia, as established by SEPTA's Motion to Withdraw filed on March 28, 1989, reached agreements respecting testing with SEPTA after the issuance of U.S. District Judge Ludwig's opinion establishes that the subject is amenable to collective bargaining.

On August 2, 1985, the Federal Railroad Administration ("FRA") issued its Final Rules for Control of Alcohol and Drug Use in Railroad Operations, 49 C.F.R. §219.1 *et seq.*, which respondents objected to and were approved by this Court in *Skinner, supra*. These rules apply to SEPTA and provide for body fluid testing based upon "a reasonable suspicion that the employee is currently under the influence of or impaired by" alcohol or drugs, or following accidents, specified rule violations, and incidental human factors. JA I, 163a. Pursuant to these rules, SEPTA issued orders Nos. 85-1 and 85-2 on September 20, 1985. Neither order gave any indication that SEPTA would engage in random testing. Order No. 85-1 provides compliance with §219.9(a)(1), (2) and §219.101 of the FRA regulations, which require a railroad to "exercise due diligence" to ensure that no employee "use or possess alcohol or any controlled substance," or be under the influence of or impaired by alcohol or any controlled substance, while assigned, reporting for or going on duty, or remaining on duty. JA I, 159a; 160a. Order No. 85-2 is a four sentence document suggesting SEPTA will permit a "troubled employee" a one-time unpaid leave of absence for voluntary referral to treatment. JA I, 171a. The order was summarily adopted to fulfill the requirements, in SEPTA's judgment, of §219.401(b) of the FRA regulations, which states that "each railroad shall adopt, publish and implement (1) a policy designed to encourage and facilitate the identification of those covered employees who abuse alcohol or drugs as a part of a treatable condition and to ensure that such employees are provided the opportunity to obtain counseling or treatment before

those problems manifest themselves in detected violations of this part (hereafter 'voluntary referral policy'). . . ." JA I, 165a. Also, in conformity with 49 C.F.R. §219.301, on October 27, 1985, SEPTA issued Regional Rail Division Special Instruction 1001-A2 that informs the rail employees that they might have to provide a urine sample "after certain accidents and incidents or at any time the company reasonably suspects you are under the influence of, or impaired by, drugs while on duty." JA I, 82a.

Along the same lines, on July 24, 1986, SEPTA issued District Notice No. 3-26 providing that "any signal violation will result in body fluid testing," in order to comply with §219.301(b) and (c) of the FRA regulations, which require such testing for "operating rule violations or errors," including "signal violations." JA I, 163a; 1033a.

None of these publications related to or prescribed random mandatory testing. As always in the past, any testing came into play only after a purported basis for "reasonable cause" or "reasonable suspicion" arose to believe the employee could be under the influence of or impaired by the use of drugs and alcohol. The test did not become a method of detection, but a method for substantiating or refuting the "reasonable suspicion" basis for charging the individual for improper alcohol and drug use. Though the organizations did not complain in writing as to each of these steps taken by SEPTA – public objection would have been considered tantamount to sanctioning drug and alcohol use and eliminating a purported deterrent to abhorrent behavior and, in any event, most all the changes were based upon the *FRA* regulations – they did collectively bring the litigation

challenging those regulations; and, as previously described, the organizations cajoled, complained and sought to negotiate on complete and extensive testing and treatment plans and refused to vacate to the company the right to unilateral creation and development of mandatory testing and assistance programs, or to testing without some type or form of particularized suspicion or detection.

In fact, all testimony at trial established, and both the trial court and court of appeals so found (Pet. App., A28, A50), that since SEPTA assumed rail operations, it had not given random drug screens to the employees represented by respondent unions. Never prior to January 21, 1987, had SEPTA selected employees "by lot for the purpose of taking urine and blood specimens for determination of alcohol or drug use." JA I, 115a; 247a-248a; 250a; 252a; 258a-259a. In fact, clerical employees, including tower operators, were never subjected to testing until the January 23, 1987 promulgation of SEPTA's random testing policy established by Order No. 87-1. JA I, 265a.

At a news conference held on January 16, 1987, without even prior announcement to its unions, SEPTA informed the public of its intent to inaugurate a random drug and alcohol testing program for its employees represented by respondents. JA I, 83a. On January 21, 1987, SEPTA issued Order No. 87-1, a one-page document, telling its operating employees that they would be subject to urine and/or blood screening tests which would be given without advance notice. *Id.;* JA I, 175a. Failure to provide urine/blood samples would subject the employee to dismissal. JA II, 931a-933a.

On January 23, 1987, SEPTA notified eleven employees that they were required to have their urine tested pursuant to Order No. 87-1. JA I, 84a. Of these eleven, five were members of UTU, four were members of BLE, and one was a member of TCU. Followed by television cameras and members of the media, the eleven employees provided urine samples in locations near their work stations. JA I, 84a. All tested negative JA I, 86a.

On January 26, 1987, BLE, its Division 71, and Thomas C. Brennan, a SEPTA engineer and local chairman of Division 71, filed a complaint alleging constitutional violations and also that SEPTA had violated Section 6 of the RLA, 45 U.S.C. §156, by unilaterally establishing the random drug screening policy without first serving notice and exhausting the procedures set forth in the RLA. JA I, 31a-50a. The following day a similar complaint was filed by UTU, TCU and BMWE. JA I, 51a-57a.

On February 9, 1987, the district court issued a bench opinion and on February 19, 1987, entered an order preliminarily enjoining SEPTA from implementing its program of random testing as then constituted. JA I, 449a-460a. The trial court directed SEPTA to prepare a revised program. *Ibid.* SEPTA's response on February 12, 1987 was to post Order No. 87-2, its return-to-work testing policy, which was enjoined by the courts below and is the subject of SEPTA's motion filed on March 28, 1989 to withdraw that matter from its Petition.

After trial on the permanent injunction, the district court entered a memorandum approving the constitutionality of the random testing program. Pet. App. A52.

As to the employees covered by the RLA, the court granted an injunction preserving the status quo "until such time as SEPTA complies with Section 156 of the Railway Labor Act, 45 U.S.C. §151 *et seq.*" Pet. App. A53. To the railroad's assertion that the case only involved an interpretation of the existing labor contract and the unions' failure to sue it upon any of the changes from July 1, 1983 to the inauguration of random testing constituted authorization of the testing or, at least, established a minor dispute as to the meaning of the written agreement and past practices, the district court rejected same and stated:

> The unions' acquiescence in suspicion-based, post-violation, transfer and promotion testing cannot be interpreted as an authorization or even foreshadowing of 87-1. *Brotherhood of Maintenance of Way Employees, Lodge 16*, 808 F.2d at 1023. Only "long standing practices" can be considered part of a collective bargaining agreement in determining whether a proposed change is "arguably justified" by the parties' agreement. *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).
>
> * * *
>
> The program cannot be "arguably justified" by the terms of prior agreements or the parties' prior practice. The unions are correct that the proposed program constitutes a "major dispute," precipitating the notice and admininstrative requirements of 45 U.S.C.A. §156. *Brotherhood of Locomotive Eng'rs. v. Burlington Northern R.R.*, 620 F. Supp. 163, 170-172 (D. Mont. 1985), *appeal pending*, No. 85-4138 (9th Cir. argued July 8, 1986). *See Railway Labor Executives v. Norfolk & Western Ry.*, 833 F.2d 700, 707 n.6 (7th Cir. 1987). The status quo role of Section 156, which is the

> centerpiece of the Act, is intended to encourage resolution through mediation and, if necessary, arbitration. . . .

Pet. App. A50-A51.

The Third Circuit upheld this determination. The decision that the dispute was a major one subject to negotiation was based, first, on that court's decision in *Railway Labor Executives' Ass'n v. Conrail ("Conrail")*, 845 F.2d 1187 (3d Cir. 1988), *cert. granted*, 109 S. Ct. 52 (1988) (argued Feb. 28, 1989). In *Conrail*, the Third Circuit applied the traditional "arguably justified" standard for determining the type of dispute – major or minor – before the court. Thus, the court of appeals said: "A labor dispute over implementation of a drug testing program that "can 'arguably' be justified by the existing agreement," or " 'from habit and custom,' is classifiable as a minor one and the proposed change may be implemented unilaterally." Pet. App. A26. However, "SEPTA's institution of random drug testing differs significantly from prior practice," and did not permit a construction of being a minor dispute subject to arbitration. *Ibid.* Moreover, SEPTA's argument that the railway unions' acquiescence in other forms of testing was found to "ignore[] the significant difference between drug testing predicated on requests for transfer or promotion, which carries an element of voluntariness" and "testing on the basis of reasonable suspicion of drug use bears an element of 'cause' not present in the case of random testing." Pet. App. A27-A28. And the court of appeals found ample support in the record for the district court's finding that there was " 'no evidence that the unions agreed to or acquiesced in widespread testing or to any significant testing without

individualized suspicion.' 678 F. Supp. at 551." Pet. App. A28. Thoroughly analyzing the extensive trial record before it, the lower court concluded in a unanimous opinion:

> SEPTA's addition of broad random testing to its previous policies thus constitutes a major dispute for the purposes of the RLA, and the district court rightfully enjoined SEPTA from implementing random testing of employees covered by the RLA pending exhaustion of the mediation and conciliation procedures required under that Act.

Pet. App. A28-A29.

REASONS FOR DENYING THE WRIT

I.

THE DECISION IS CONSISTENT WITH THE HOLDINGS OF THIS COURT

In part, the court of appeals affirmed the judgment of the district court on the basis of its own prior opinion in the *Conrail* case. In *Conrail,* the Third Circuit held that the unilateral addition of a drug screen to employee medical examinations gave rise, under the facts of that case, to a major dispute under the RLA. The district court had found the dispute to be a minor one on the basis of being "arguably justified under the terms of the parties' long-standing medical policy." The court of appeals reversed, because, in its opinion, it was not "plausible to believe that there was in fact a meeting of the parties' minds on the general issue." 845 F.2d *supra* at 1193. Before this Court, Conrail has urged that the dispute is factually a minor one because it has acquired by past practice the implied contractual right to implement the new rules and

working conditions relative to medical examinations. It has asserted that under those conditions, the Third Circuit failed to apply its own "arguably justified" standard. The railway unions, however, in that case have argued that a carrier does not have any such contractual right to make such unilateral changes, unless the carrier can establish that it has a clear and patent contractual right to make those changes.

Obviously, if the Court affirms the decision in *Conrail*, there would be no reason whatsoever to grant the petition in this case. However, we submit that even if the Court did set aside the Third Circuit's decision therein, it should not follow that the judgment in this case should receive the same treatment.

Insofar as the RLA is concerned, this case involves no question of law that is novel or worthy of review. This Court has fully defined the standards for determining "major" and "minor" disputes. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1944). In *Detroit & Toledo S.L. R.R. v. United Transportation Union*, 396 U.S. 142 (1969), the Court held that unilateral changes by a carrier in major working conditions without first serving a Section 6 notice and thereafter exhausting the negotiation procedures of the RLA was a major dispute and violated Sections 2, Seventh and 6, 45 U.S.C. §§152, Seventh and 156.

The Court held that the RLA's status quo requirement is central to its design. *Id.*, 150. The purpose of this requirement is to prevent the employees from striking and a carrier from doing anything that would justify a strike, for the "heart of the Railway Labor Act" is the

duty to make every effort to reach consensual solutions to disputes in the workplace. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Therefore, in *Shore Line*, the Court held that the carrier's actions warranted dismissal of its complaint for a strike injunction and a grant of relief to the employees enjoining the railroad's unilateral actions. The status quo to be preserved until the RLA's procedures are invoked and exhausted, the Court said, "are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing agreement." 396 U.S. *supra*, at 143.

From these decisions of this Court, the courts of appeals developed a well-established, uniform test for deciding whether a set of facts constitutes a major or minor dispute. *See, e.g., United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, at 544 n. 5 (3d Cir. 1974). This test requires an overview as to whether existing collective bargaining provisions "arguably justify" the carrier's unilateral action or are "reasonably susceptible" of the interpretation advanced by the carrier.

The court below correctly set forth the legal standards for determination of this dispute. Contrary to SEPTA's contentions, this case, therefore, only involves the question of whether the courts below correctly canvassed the record. Both the trial court and court of appeals held that the facts of the case established a major dispute between the parties arising from an attempt by the carrier to insert a new provision in the collective bargaining agreement through establishing a new method

for enforcement of Rule G – mandatory random testing without any particularized or generalized suspicion. Whether the courts below were right in the decision, and we submit they were, does not present a question deserving review by the Court.

Further, just as obviously an affirmance in *Conrail* would require the same result in this case, it necessarily follows that adoption of the clear and patent test asserted by the respondent unions in *Conrail* would clearly require a ruling here that the district court had jurisdiction to issue the status quo injunction, because SEPTA has never established a clear and patent contractual right to make the changes it seeks here.

Rather, the reverse has been true. On SEPTA and its predecessor, violations of Rule G have been detected and enforced through sensory surveillance. The bargaining agreement is silent on Rule G and does not expressly or implicitly refer to that rule or to its enforcement. Any testing that has come into play has been based upon particularized suspicion that the individual was under the influence of alcohol or drugs or upon FRA authorization. SEPTA never tested by lot or without individualized suspicion. Thus, when it began mandatory random testing, it was giving itself a right that it had never previously exercised or been granted. These actions of SEPTA sought rights for the future as to entire classes or crafts of employees – the typical major dispute. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, at 723 (1944).

The court of appeals correctly rejected SEPTA's attempt to change its existing legal obligations in the basic employment relationships with its rail employees,

changes by which their jobs are affected, without compliance with the major disputes procedures set forth in the RLA. In *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), this Court rejected a similar railroad contention that a union's attempt to secure a new provision going to the heart of employment, job security, was not negotiable and that the controversy was a minor one. In reply to the traditional argument of carriers, the Court stated:

> . . . [I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of that agreement.

Id., at 341. Here, SEPTA had no clear and patent right to institute a mandatory random testing program, and the courts below, under any formulation of the standard to determine major-minor disputes, correctly found the dispute between the parties to be a major one.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner appears to contend that the decision below should be judged by different standards as to major-minor due to "[t]he enormity of the problem facing this country because of drug use." Pet. 19. Caught up with the current vogue of more and more testing to eliminate alcohol abuse and drug use, SEPTA seeks a ruling that conditions demand the immediate institution of mandatory testing programs and railroads, therefore, should be encouraged to bypass RLA bargaining procedures for the

time being, that is, until the termination of the current labor contract. Pet. 21. In essence, SEPTA is raising, on the one hand, a complaint about the RLA and the bargaining process required by that Act and on the other hand, a political complaint that legislation should be adopted allowing railroads to engage in extensive random testing. Those complaints should be directed to Congress, which has had legislation before it to remove this item from the bargaining table.

Apparently, in light of the enormity of the problem as advanced by SEPTA, the decision below is claimed to conflict in principle with two decisions, the Seventh Circuit's decision in *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), and the Eighth Circuit's decision in *Brotherhood of Maintenance of Way Employes, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), because those cases recognize the needed refinement in testing in order to have an adequate and profound impact on the problem of alcohol and drug use.

SEPTA goes too far. Neither the Seventh nor the Eighth Circuit had before it compulsory random testing. In fact, SEPTA concedes that "both the Seventh and Eighth Circuits in the foregoing decisions inferentially expressed skepticism as to whether the implementation of random testing would present only a minor dispute." Pet. 17, at n. 11. Moreover, SEPTA misreads the decision of the Eighth Circuit, for all that the decision in *Brotherhood of Maintenance of Way Employes v. Burlington Northern*, 802 F.2d 1016, establishes is that in canvassing that record as to the past practices between that union and that carrier, the court found the changes were minor and

the railroad had stayed "within the boundaries of this understanding" and had not "depart[ed] from these established practices in such a substantial way as to abrogate the implied contractual term which they represent." *Id.*, at 1022. Based upon the findings and the legal conclusions concerning the agreement's scope, the Eighth Circuit held that post-incident and post-furlough testing were minor. As the decision is based upon the court's canvassing of the record and does not involve random testing, the decision is not in conflict in any manner with the decision below.

In a subsequent decision, the Eighth Circuit distinguished its earlier opinion. In *Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988), that court of appeals refused to accept an argument similar to SEPTA's which was advanced by the carrier in that case. Comparing the pre-amendment and post-amendment versions of the parties' agreement, the court concluded:

> Common sense and this Court's prior cases indicate that there are limits on the extent to which the CNW may amend Rule G consistent with the history and acquiescence of the parties in past amendments. In this light we agree with the district court that the agreement of the parties (including any terms necessarily implied as a result of established past practices and working conditions) is not reasonably susceptible to the CNW's proposed interpretation whereby it has the right to unilaterally extend its operating rules to regulate off duty use, possession, or sale of illegal drugs in the manner contemplated by Rule G.[5]

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[5] The CNW additionally contends that because it has retained the right to unilaterally amend Rule G since its inception, the status quo imposed pursuant to 45 U.S.C. § 156 must also include that right. * * * On the basis of our rejection of the CNW's assertion that any implied term must include the absolute power to amend Rule G unilaterally, we affirm the district court in this regard.

The court, therefore, held that a new rule disciplining employees for off-duty use or possession of narcotics constituted a formal change of the collective bargaining agreement and, therefore, was a major dispute under the RLA.

Contrary to the implications SEPTA attempts to create, its program goes further than seeing to it that all employees are fit for duty. It fully regulates their off-duty conduct, because anyone subject to duty or call to duty may be required to take and pass the random test. Further, the tests look to metabolites which register a prior history of use, not necessarily current use or impairment at that point of time for duty. Moreover, it is difficult to perceive that random testing is less obtrusive than medical examination testing as claimed by SEPTA at page 17 of the petition. Here, "[t]he final random testing proposal approved by the distrct court subjects 2,600 workers to random urinalysis testing over a one-year period, and approximately 5,400 workers per year to random breathalyzer testing." Pet. App. A9. About 10 percent of the employees will be tested twice, and two percent more frequently, leading the district court to say, "Using this statistical design, each operating employee will be at testing risk every day, although the chances of being

tested more than twice a year will be small." Pet. App. A42.

Moreover, as the leading authorities establish, each case must be evaluated on its own facts as to whether there has been any "meeting of the minds" by the parties so that the prior history establishes a contractual right. Thus, SEPTA's reference to the Seventh Circuit's comment on the lack of union objection to medical examinations in the *Norfolk & Western* case makes much ado about little. For example, in *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet. for cert. filed*, 57 U.S.L.W. 3017 (U.S. April 1, 1988), the Ninth Circuit, in holding a mandatory urine testing program to be a major dispute, said in reply to a similar contention:

> BN's new mandatory urine testing program is a clear change in working conditions governed by the collective agreement and, thus, by definition a major dispute. It is a mistake to conclude that BLE impliedly agreed to the new testing program just because "through custom and practice" it had for forty years accepted enforcement of Rule G by the non-intrusive procedure of sensory surveillance.

Id., at 1093. Likewise, the Fifth Circuit has held that the implementation of a mandatory drug testing program constitutes a major dispute, for the proposed program was not "arguably justified by the contract as embodied in the express terms of the collective bargaining agreement, and as amplified by actual objective working conditions and practices." *International Brotherhood of Teamsters v. Southwest Airlines, Inc.*, 842 F.2d 794, 804 (5th Cir. 1988), *reh'g en banc granted*, 853 F.2d 283 (1988).

Accordingly, it becomes obvious, as the Eighth Circuit said in *Missouri Pacific Joint Protective Board v. Missouri Pacific R.R.*, 730 F.2d 533, at 536-37 (8th Cir. 1984):

> . . . [W]hether a dispute is minor or major is often a question of degree, *Itasca Lodge 2029 v. Ry. Express Agency, Inc.*, 391 F.2d 657, 665 (8th Cir. 1968) (quoting *Rutland R.R. Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), and turns upon the facts in each case. *See United Transporation Union, Lodge 612 v. Illinois Terminal R.R. Co.*, 471 F.2d 375, 379 (7th Cir. 1972); *Rutland*, 307 F.2d at 36. Whether a dispute is minor or major involves first a determination of factual issues, *see Airline Pilots Ass'n v. Northwest Airlines, Inc.*, 570 F.2d 257, 258 (8th Cir. 1978), and then conclusions of law based on those findings.

When this record is appropriately reviewed, common sense dictates that one must conclude that the decision of the court of appeals is consistent in reasoning with prior RLA decisions and does not conflict with any applicable holding in any other circuit.

III.

THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT

Respondents submit that this case involves only a very narrow RLA issue – one which has been authoritatively determined by this Court or will be as a result of the ruling in the Conrail case now before the Court, was decided under a uniform standard followed by the various courts of appeals, and has been ruled upon in an adequate and consistent manner by various courts. Nevertheless, SEPTA is requesting the Court to address an

issue that is more properly one to be determined, if at all, by legislation — legislation, which regardless of its merit, could remove drug and alcohol testing programs from the collective bargaining table and give employers the exclusive authority to promulgate the type of massive testing programs sought by SEPTA.

However, SEPTA seeks to convert a relatively simple labor relations issue into a unique and unusual situation, which this is not. Railway employers and their employees have always been confronted with tough bargaining decisions and have resolved those disputes. SEPTA's claim that drug testing programs should not be subjected to collective bargaining because the employees must be deterred from using alcohol and drugs and the court of appeals erred, therefore, is simply wrong. The appellate court clearly did not decide that employees can use drugs and alcohol without suffering the consequences of their indiscretions. Moreover, SEPTA's contention is contrary to the view expressed by its own expert and other well held expert opinion that effective drug and alcohol programs must be cooperative labor-management programs and fashioned through collective bargaining. Manello, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads*, Federal Railroad Administration, Technical Report, Contract No. DOT-TSC-1375 (1979). *See also* testimony of Dr. Robert J. Pandina, Resp. App. at 4a.

Further, SEPTA's assertions are contrary to the prevailing view that drug testing affects employment relationships and is a working condition. That argument flies

in the face of the well held principle that drug testing is an appropriate subject of collective bargaining.[3]

As we previously noted, during the pendency of this case, major railroads have negotiated comprehensive, cooperative testing and enforcement programs with the respondent unions. During that period, SEPTA could have bargained with respondents on a complete drug and alcohol program. Rather, it refused. The reason there is a somewhat complete program today is not due to SEPTA, which has been forced to it by the fight by respondents for some accommodation of the personal and constitutional concerns of their members. That the picture painted by SEPTA is, in fact, not a true facsimile of the real life situation can be seen from its successful negotiation of testing programs in recent days with the Brotherhood of Railroad Signalmen, Local 234 of the Transport Workers' Union of Philadelphia, and Local 1594 of the United Transportation Union (trolley division covered by

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[3] In NLRB General Counsel Memorandum 87-5 (Sept. 8, 1987), 4 CCH Labor Law Rep. ¶9344, the General Counsel for the National Labor Relations Board opined that: (1) drug testing for employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d); (2) implementation of a drug testing program is a substantial change in working conditions even where physical examinations previously had been given and even if established work rules precluded the use or possession of drugs in the plant; and (3) the established Board policy that a union's waiver of its bargaining rights must be clear and unmistakable will be applied to drug testing. SEPTA's argument that it has, or should have, an absolute right to change conditions of employment with respect to drug use is diametrically opposed to the position of the NLRB's General Counsel.

state labor relations law). If SEPTA had bargained in good faith with the railway unions on comprehensive, cooperative programs, which include testing in a medical mode, its concerns, the public's concerns, and the concerns of the unions and their members might have been accommodated long before now. And we submit that collective bargaining will work with the respondent rail unions once these legal manuevers by SEPTA are terminated.

In this connection, we observe that until Congress sees fit to remove particular subjects from the collective bargaining table, the public interest will best be served by requiring adherence to the mandatory requirements of the RLA. Collective bargaining will also insure that each employee's constitutional rights in an equitable and humane testing and enforcement program will be adequately protected. Moreover, with those procedures being collectively bargained with safeguards in a collaborative program, litigation and controversies will be negated and fairly limited, thereby reducing strains upon the forums dealing with such problems, effectively eliminating tensions in the labor-management relationship, and enhancing morale in the work place.

Simply put, this case does not involve any situation demanding the exercise of this Court's guidance, as asserted in the petition. It is a typical labor controversy — difficult to resolve perhaps, but one that can be and has been satisfactorily resolved throughout the modern history of the RLA. Thus, the determinations below, which we believe were correct, do not warrant this Court's attention.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

Excerpts of Testimony of Robert J. Pandina from Transcript in *Transport Workers Union, Local 234, et al. v. Southeastern Pennsylvania Transportation Authority* Civil Action No. 87-0389, etc., United States District Court for the Eastern District of Pennsylvania (678 F. Supp. 543 (E.D.Pa. 1988).

(February 5, 1987)

(p. 267) ROBERT J. PANDINA, having been duly sworn, was examined and testified as follows:

(Direct Examination)

(p. 283) Q. What other elements would you think are essential to provide an effective or successful program?

A. I preface my remarks by saying this is an area in which a tremendous amount of clinical and what we would call experimental, or quasi-experimental work is being done at the present time. It is far from an exact science, if you will.

However, we have learned some lessons from our experience to date. For example, it is my opinion, based on my experience and from the examples in which I have been involved, that any effective program must have a number of elements with the treatment rehabilitation component being only one of those legs of the stool upon which such a program can rest.

Another element is clearly an education and training program. And here, by that I mean a broad-based program. Not simply for supervisors or for management, but

would also include employees to help to motivate employees to understand the problems involved in any drug usage and the ways in which such drug usage could compromise their competency not only on the job but in their own personal functioning.

In a sense, here we are talking about a kind of motivational component and an information component. We are trying to inform people what the problems related to drug use are. And to motivate them to be abstinent; that is, drug free.

A second component part of that training program is (p. 284) also to help train them with regard to the rules, whatever those rules are, with regard to company management policies so that they understand how to use such systems as rehabilitation systems. After all, a rehabilitation system cannot be very effective if you cannot obtain bodies to put in the system, and it is important to find a way to motivate employees to the system and teach them how to use it.

You must also train others in a position of authority, such as management personnel, supervisors, you must train them in the same way that you train all employees with regard to problems related to alcohol and drug use and abuse, and as well as to train them to the way the system operates in that particular culture.

You then, in addition to education and training programs, must also have a rehabilitation component; that is, a treatment component, including a screening component which would allow you to deal with employees who have such problems.

A third and important element is a set of rules and penalties, sanctions, with regard to use of various kinds of substances in the environment, and there needs to be, in essence, sanctions against the use of such drugs, or use of such drugs in a manner in which they will interfere with or can potentially interefer (sic) with the performance of the individual. This is, in a sense, an external incentive.

I make a distinction between a motivation where we (p. 285) are attempting to provide information to the individual to motivate them toward a particular behavior, and an incentive in the environment.

One of the other incentives in the environment, I consider this to be critical, is the ability of the system to deal with individuals who voluntarily come forward to be treated and not to impose severe sanctions against people who voluntarily come forward.

I would also be concerned that those individuals receive whatever compensation during that period of disability that they might receive, as they might receive for any other disability. In other words, it has to be within the culture, the climate of the organization.

I would expect the organization, for example, if it paid for sick benefits for pneumonia, or a mental disfunction, also to pay for any drug abuse treatment, up to some reasonable limits, and that is negotiated between the management and the union.

Those are the basic elements in any what I would consider to be a good program. Without any of those, you've got some real problems.

* * *

(February 6, 1987)

(Cross-Examination)

(p. 492) Q. I gather from your testimony in chief that you do believe that one of the major ingredients in having a good drug and alcohol program with any employer is a cooperative program between labor and management.

A. Absolutely.

Q. And would you say that there should be negotiated programs between those parties?

MR. MEYER: I object, your Honor. That really goes to one of the matters that you have to decide in this case.

THE COURT: Overruled.

You may answer.

A. Could you restate the question, or could we have it read back?

(p. 493) (The court reporter read back the pending question.)

A. Under the best of circumstances, that would be most desirable.

Q. And, would you say in your judgment that the negotiations should include a cooperative labor management rehabilitation phase in that program?

A. I don't think I understand your terminology, sir.

Q. Or should the two parties, labor and management, sit down and also draw up the requisites, and et cetera, of a rehabilitation program?

A. In theory I would say that that is an important element. Of course you also have to take into account, as you probably well know, the history of the way labor and management have operated in the past in such types of agreements.

* * *

(September 21, 1987)

(Recross Examination)

(p. 97) Q. I believe you testified last time that represent – involvement by a labor union, representing employees, is important in an EAP, if the EAP is going to work; is that correct?

(p. 98) A. I said that's an important element, yes, it's a desirable element, yes.

Q. What role would that the union have in that circumstance?

A. I would see the chief role of that union would be to encourage its membership to participate in the employee assistance program. I would also see it joining it as a partner in that EAP program, particularly in the area, as I've mentioned, to encourage individuals to participate. I would hope that they would have the opportunity to make comment on the program that was suggested by management.

* * *